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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF FLORIDA, A BODY CORPORATE, FOR AND ON BEHALF OF FLORIDA INTERNATIONAL UNIVERSITY.

BRIEF ON BEHALF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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BRIEF ON BEHALF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

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Interest of Amicus

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation established under the laws of the State of New York. It was formed to assist black

persons to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to black persons suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in litigation before this Court and the lower courts involving a variety of issues brought pursuant to 42 U.S.C. § 1983. E.g., Monell v. New York City Departmet of Social Services, 436 U.S. 658 (1978); Brown v. Board of Education, 347 U.S. 483 (1954). The Legal Defense Fund believes that its experience in such litigation and the research it has performed will assist the Court in this case. The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk.

Summary of Argument

We respectfully submit that neither the language nor the legislative history of section 1 of the Civil Rights Act of 1871, presently codified as 42 U.S.C. § 1983, impose any requirement of exhaustion of administrative remedies. The legislative history reveals that Congress intended no such restriction on the broad right to bring section 1983 actions. Nor can any such restriction be implied in light of the fact that any notion of a judicially imposed exhaustion requirement did not emerge until much later, in the twentieth century. Indeed, any exhaustion requirement would be inconsistent with one of the critical findings of the forty-second Congress that state officials were unwilling to enforce constitutional guarantees.

This is not to say that potential plaintiffs must or will inevitably sue under section 1983. Rather, Congress has provided an incentive for improvement of administrative and other remedies in the states by continuing to make section 1983 a ready remedy while permitting those aggrieved to utilize any state remedies which they believe to be efficacious.

ARGUMENT

Whether as a matter of policy it would be wise to require, as a precondition of access to federal courts, that persons alleging violations of their constitutional rights, first exhaust any available state administrative remedies, is a complex, sensitive, and important question. The court of appeals below viewed this case as an appropriate vehicle to express its views

regarding federal-state relations, the ideal allocation of judicial resources, and the best manner in which the federal courts can encourage the states to strengthen their administrative procedures. We believe that the Fifth Circuit misconceived the nature of the issue before it, and the role of the federal courts in resolving it.

The question presented by this case is not one of judicial philosophy, but of statutory construction. The responsibility of the courts is limited to ascertaining the intention of the Congress which met some 110 years ago and fashioned the 1871 Civil Rights Act. Those legislators lived in a time very different from our own. Half the country, still prostrate from an exhausting war, wavered between mob rule and total anarchy; the Klu Klux Klan,

today little more than a deplorable relic of past hatreds, then functioned as virtually a shadow government in many southern states. Far from being concerned about offending the sensitivities of "sovereign states," the forty-second Congress presided over a military occupation of those former Confederate States, whose leaders it often labeled as traitors. Whether the 1871 Civil Rights Act was wisely drafted when adopted, or ought to be amended in light of changing conditions, are not questions this Court need or should address. The sole issue before this Court is whether the framers of that Act intended that its remedies only be available to those who had first exhausted state administrative remedies.

I. THE LANGUAGE OF SECTION 1983

Because the question of exhaustion is one of statutory construction, the language of the statute itself is of central importance. By its terms section 1983 creates a species of tort liability that admits of no preconditions or prerequisites. See Imbler v. Pachtman, 424 U.S. 409, 417 (1976). Its language is absolute and unqualified; no mention is made of state or federal administrative remedies, of state judicial proceedings, or of any other event which must occur between the constitutional violation and the commencement of the authorized civil action. See Owen v. City of Independence, 445 U.S. 622, 635 (1980). Rather, the act imposes liability on "[e]very person" who under color of law subjects "any person" to a "deprivation of any rights, privileges, or immunities

secured by the Constitution and laws." Nothing on the face of the statute suggests that only persons who have exhausted state remedies, rather than "any person" whatsoever, can avail themselves of the protection of the statute.

The existence of an exhaustion requirement is inconsistent with the type of defendants subject to suit in a section 1983 action. Most of the cases imposing exhaustion requirements involved litigation against government agencies seeking remedial orders aimed at those agencies themselves. But section 1983 is not so directed. It authorizes suit not just or primarily against government bodies, but against any "person" who has violated federal rights under color of state law. States can never be named as defendants,[1/] and local govern-

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1/ Quern v. Jordan, 440 U.S. 332 (1979).

ments can only be sued under certain narrowly defined circumstances.[2/] Natural persons are the most common, and frequently the only defendants in section 1983 cases.

Exhaustion is a rule about when a party suing a state or federal agency must utilize remedies provided by that defendant agency to correct its own errors. An exhaustion requirement could intelligibly, although mistakenly in our view, be applied in a police brutality suit against a city. But if such a suit, as Congress clearly contemplated most section 1983 suits would be, were against an individual police officer, exhaustion is an anomalous concept. The actual defendant policeman simply has no "administrative remedies" to

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2/ Monell v. New York City Department of Social Services, 436 U.S. 658, 690-695 (1978).

offer. The City is not a named defendant, and if, as alleged, the conduct complained of is unconstitutional, the conduct is "without the authority of, and does not affect the [city] in its sovereign or governmental capacity." Ex parte Young, 209 U.S. 123, 159 (1908). A city or state, of course, may choose to create an administrative remedy for injuries caused by its employees acting in excess of their authority, just as it may provide assistance for victims of harms committed by private wrongdoers, such as compensation for victims of crimes. The perpetrator of such a private crime could not conceivably immunize himself from suit by demanding that his victim "exhaust" such third party remedies. The position of a wrongdoer who happens to be a public official is not significantly different. It is unlike-

ly in the extreme that Congress intended, where a suit was brought against both a city and its officials, that the action could proceed against the official but would have to be stayed pending exhaustion as to the city itself. It is only marginally less unlikely that Congress intended to impose an exhaustion requirement in the minority of cases in which only a government agency was named as a defendant.

The debates leading to the passage of section 1 of the Civil Rights Act of 1871, the forerunner of section 1983, support a literal reading of this broad and unrestricted language. Representative Shellabarger, the author and manager of the bill in the House, explained how the courts should interpret the Act:

> This Act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing

> such statutes are liberally and beneficently construed.
>
> . . . . As has been again and again decided by our own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. 3/

See also Monell v. New York City Department of Social Services, 436 U.S. 658, 683-87 (1978).

The adoption of an exhaustion requirement, for whatever reasons, would necessarily establish a barrier, sometimes temporary, on occasion perhaps permanent, to relief in the federal courts. At the least an aggrieved party would find that, until exhaustion was completed, the national courts were closed to him; if all state

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3/ Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871).

remedies were not sought, access to the federal courts might be precluded forever. Nothing could have been further from the contemplation of the framers of the 1871 Act. Representative Lowe insisted that the Act "throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired."[4/] Congressman Coburn urged:

> Obviously the court of justice is the first instrument to be used in aid of the fourteenth amendment; safer, milder, surer, more in accordance with reason, with our system, and with public sentiment. Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ... Here may come the weak and poor and downtrodden with assurance that they shall be heard. [5/]

Even those who opposed other aspects of the

[4/] Cong. Globe, 42nd Cong., 1st Sess. 376.

[5/] Id. 459.

Act agreed that the federal courts should be available whenever a constitutional violation were threatened. If a state passed laws contravening the Fourteenth Amendment, Representative Slater emphasized,

> Such laws would be simple nullities ... and every officer of the state, from a justice of the peace to the supreme judge, from a constable to the Executive, under their oath to support the Constitution of the United States, would be bound to disregard them. If, however, their enforcement were attempted, the citizen is not without means of protection. The Federal courts, always open with writs of habeas corpus, writs of restraint, and injunctions, and other remedial agencies, can at all times render efficient and ample security against actual or threatened disregard of these guarantees. 6/

That the doors of the federal courts should now be closed to petitioner, as the courts below urged, would be squarely contrary to the original intent of Congress.

6/ Id. App. 305 (emphasis added).

II. THE ORIGINS OF THE JUDICIAL REQUIREMENT OF ADMINISTRATIVE EXHAUSTION

The broad language of section 1983, combined with the expansive construction of it clearly contemplated by its framers, would ordinarily be sufficient to defeat any claim that relief against a particular party could be delayed or denied. This Court has only recognized as limitations to section 1983 actions rules "so firmly rooted in the common law ... that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" Owens v. City of Independence, 445 U.S. 662 (1980). Thus in Tenney v. Brandhove, 341 U.S. 367 (1951), this Court concluded that legislative immunity was in 1871 such a long established doctrine, noting that it had been at the center of the Parliamentary struggles of the sixteenth and seventeenth

centuries, and was expressly incorporated in the English Bill of Rights, the Articles of Confederation, the Constitution, and at least eight 18th century state constitutions or bills of rights. 341 U.S. 372-75.

In Monell both the majority and the dissenters agreed that the state of the law in 1871 regarding municipal immunity was of controlling importance in determining whether cities could be sued under section 1983. The majority rejected any absolute municipal immunity because "by 1871, ... municipal corporations were routinely sued in the federal courts and this fact was well known to the Members of Congress," 436 U.S. at 588. Justice Rehnquist argued, to the contrary, that at that time "no state court had ever held that municipal corporations were always liable in tort in precisely the same manner as other persons."

436 U.S. at 721. Similarly, in Owens v. City of Independence, 445 U.S. 622 (1980), all members of the Court regarded this historical issue as critical. The majority concluded that the broad language of the statute could not be restricted by good faith immunity for local governments because in the nineteenth century "the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful." 445 U.S. at 641. Justice Powell and three other members of the Court dissented on the ground that the majority opinion "runs counter to the common law in the 19th century, which recognized substantial tort immunity for municipal actions." 445 U.S. at 676.

If the right of petitioner in this case to maintain an action in federal court

is to be delayed or denied, despite the literal language of section 1983, it must be because the principle of a judicially imposed administrative exhaustion rule was so firmly established in 1871 that Congress was well aware of it, knew that the courts would apply it unless otherwise directed, and would have expressly disapproved of that judicial practice had it not wanted it applied. Fortunately here, unlike Monell and Owens, the issue is clear beyond peradventure. This exhaustion doctrine was totally unheard of in 1871.

Scholars generally agree that the idea of a judicially imposed administrative exhaustion requirement has its roots in Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908).[7/] In that case the rail-

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7/ Comment, Exhaustion of Administrative Remedies, 39 Cornell L. Q. 273, 277 (1939)

road challenging certain proposed rates as confiscatory had failed to appeal them to the Virginia Supreme Court of Appeals, which reviewed such rates in a legislative capacity. Mr. Justice Holmes, emphasizing that "[n]o new evidence and no great additional expense" would be involved, held that the railroad had sued too soon, and

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7/ continued

("Prentis v. Atlantic Coast Line Co., is the real beginning of the exhaustion rule."); Lilienthal, The Federal Courts and State Regulation of Public Utilities, 43 Harv. L. Rev. 379, 385 (1930) ("The doctrine had its beginning in Prentis v. Atlantic Coast Line Co.,"); Note, 51 Harv. L. Rev. 1251, 1261 (1938)("This principle was established in the case of Prentis v. Atlantic Coast Line Co."). Alpert, Suits Against Administrative Agencies under N.I. R.A. and A.A.A., 12 N.Y.U.L.Q. Rev. 393, 395 (1935). Professor Berger argues that the doctrine originated in this Court in a decision four years before Prentis, United States v. Sing Tuck, 194 U.S. 161 (1904). R. Berger, Exhaustion of Administrative Remedies, 48 Yale L. J. 981, 981-82 (1938).

directed it to pursue that appeal. 211 U.S. at 230. But the Court did not pretend it was applying any hitherto heard of rule. The majority opinion repeatedly disavowed any attempt to formulate a "general rule" or "general principles," 211 U.S. at 229; it cited no authority for its decision, and indicated that the defendant had not raised the argument on which the decision was based. Id.

The possibility that exhaustion was a requirement of general application emerged only slowly. The early attempts to invoke Prentis as a defense sought to require exhaustion of judicial remedies, and were soundly rejected.[8/] In 1921 the Supreme Court unanimously reversed a court of

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8/ Prendergast v. New York Telephone Co., 262 U.S. 43, 48 (1923); Bacon v. Rutland Railroad Co., 232 U.S 134, 137 (1914).

appeals decision that a consumer aggrieved by federal agency action increasing utility rates had to file a formal complaint and seek a modification of that decision.[9/] In Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 123-24 (1926), the Court held that the plaintiff could not complain of action taken by the Board until he had sought a hearing before it on the dispute in question, but this was an argument the defendant itself had never made.[10/] Not until 1929 do this Court's decisions refer to a "doctrine" approved in Prentis.[11/] The term "exhaust" appears

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9/ Hollis v. Kutz, 255 U.S. 452, 453-54 (1921).

10/ Brief on Behalf of Defendant in Error, No. 320, October Term 1925, pp. 3, 23.

11/ Gilchrist v. Interborough Rapid Transit Co., 279 U.S 159, 208 (1929).

only intermittently in those early years.[12/] Only in Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938), some 57 years after the enactment of section 1983, is the existence of a judicially imposed exhaustion requirement sufficiently clear that any inference about Congressional intent could even arguably be drawn from Congressional silence.

The absence of any judicial exhaustion requirement until long after the enactment of section 1983 is particularly important because the 42nd Congress was well aware of the volume of litigation in the federal courts against local governments. Monell v. New York City Department of Social Ser-

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12/ Porter v. Investors Syndicate, 286 U.S 461, 468 (1932); First National Bank of Greeley v. Board of County Commissioners of County of Weld, 264 U.S 450, 453 (1924).

vices, 436 U.S. 658, 673, n.28 (1978); Owen v. City of Independence, 445 U.S. 622, 642-43 (1980). Only where federal law expressly required exhaustion as a precondition of suit did the courts impose such a requirement. Nicholl v. United States, 7 Wall. (74 U.S.) 122, 130-31 (1869).

Whenever during the 19th century Congress wished to impose an exhaustion requirement, it did so expressly and unequivocally. In 1857 Congress authorized importers who paid duties under protest to sue for a refund provided they first appealed to the Collector of Customs.[13/] In

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13/ "On the entry of any goods, wares and merchandise imported on and after the first day of July aforesaid, the decision of the collector of the customs at the port of importation and entry, as to their liability to duty or exemption thereform shall be final and conclusive against the owner, importer, consignee, or agent of any such goods, wares, and merchan-

1866 Congress gave aggrieved taxpayers the right to sue the Commissioner of Internal Revenue for taxes erroneously or illegally assessed, but only if an "appeal shall have been duly made to the commissioner."[14/]

13/ continued

> dise; unless the owner, importer, consignee or agent shall, within ten days after such entry, give notice to the collector, in writing of his dissatisfaction with such decision, setting forth therein distinctly and specifically his grounds of objection hereto, and shall, within thirty days after the date of such decision, appeal therefrom to the secretary of the treasury, whose decision on such appeal shall be final and conclusive; and the said goods, wares and merchandise shall be liable to duty or exempted therefrom accordingly, any act of Congress to the contrary notwithstanding; unless suit shall be brought within thirty days after such decision for any duties that may have been paid, or may thereafter be paid, on said goods, or within thirty days after the duties shall have been paid in cases where such goods shall be in bond." 11 Stat. 195.

14/ "No suit shall be maintained in any court for the recovery of any tax

The forty-second Congress, which framed section 1983, also gave merchant seamen a cause of action for a penalty of up to one hundred dollars against any ships master who failed to provide adequate water and provisions, but the penalty could not be sought until the seamen had complained to a navy officer or an American consular offi-

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14/ continued

alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue, according to the provisions of law in that regard, and the regulations of the secretary of the treasury established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: Provided, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal." 14 Stat. 152.

cial. 17 Stat. 269. No such exhaustion requirement, on the other hand was imposed as a precondition of suits in the Court of Claims.[15/] This legislation makes clear that the Congress which enacted the 1871 Civil Rights Act knew how to write an exhaustion requirement into a statute and did so whenever it wanted to require the utilization of administrative remedies prior to suit. Its refusal to place such a requirement into section 1983 can only be understood as a deliberate decision not to impose any such requirement on those seeking relief against state officials violating federal rights.

Had Congress intended to impose any exhaustion requirement, it is far more likely that it would have been concerned

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15/ 10 Stat. 612.

with exhaustion of state judicial remedies than state administrative remedies. The violations of federal rights about which Congress was concerned, particularly violence directed at blacks, federal officials and union sympathizers, were, then as now, redressed by judicial action. In the nineteenth century administrative remedies were so untried and even uncommon that it is far more probable that Congress would have expected any redress to come from the courts. The state courts were at least marginally more likely to be independent of local politics and passions than would elected officials dependent on popular support for continuation in office. Although state judges might be obligated by the Supremacy Clause to enforce the Constitution, the constitutional doctrine which reigned in 1871 was that the federal government could not impose on state

executive officials any obligations to implement federal law. Monell v. New York City Department of Social Services, 436 U.S. 658, 676-79 (1978) (discussing Prigg v. Pennslyvania, 16 Pet. 539 (1842), and Kentucky v. Dennison, 24 How. 66 (1861)).

The legislative history of section 1983, however, makes clear that judicial exhaustion was not to be required. The opponents of the 1871 Act well understood that it contained no requirement of judicial exhaustion, and objected to it on precisely that ground. Representative Storm complained that section 1

> does not even give the State courts a chance to try questions, or to show whether they will try the questions that might come before them under the first section of the fourteenth amendment, fairly or not. It takes the whole question away from them in the beginning.
>
> Now these questions could all be tried, I take it, in the State courts, and by a writ of error ... could be

> brought before the Supreme Court for review.... But the first section does not allow that right. It takes the whole question away at once and forever ... 16/

Senator Thurman opposed that section

> because of the centralizing tendency of transferring all mere private suits, as well as punishment of offenses, from the State into the Federal courts. I do not say that this section gives to the Federal courts exclusive jurisdiction. I do not suppose that it is so understoood. It leaves it, I presume, in the option to the person who imagines himself to be injured to sue in the State court or in the Federal court, an option that he who has been least injured, but who has some malice to gratify, will be the most likely to avail himself of. 17/

The inclusion of this objection in Thurman's "parade of horribles" is precisely the sort of evidence as to the meaning of the act which Mr. Justice Rehnquist

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16/ Cong. Globe, 42nd Cong., 1st Sess. App. 86.

17/ Id. App. 216.

thought critical in Monell v. New York City Department of Social Services, 436 U.S. 658, 722 (1978).

III. THE PURPOSE OF EXHAUSTION AND THE LEGISLATIVE HISTORY OF SECTION 1983

Although the justifications offered for the exhaustion rule are numerous, many are obviously inapplicable here. The most common application of the exhaustion requirement is where a plaintiff seeks review by the courts of action by a federal agency charged by statute with implementing the statute on which the plaintiff relies. See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938). The considerations of expertise and statutory responsibility relevant to such a case clearly have no place here. The 1871 Civil Rights Act did not establish any state agencies to enforce the Constitution; neither did it direct or authorize state

officials to provide any administrative or judicial remedies for constitutional violations. Nothing in the language of the statute contemplates that the states are to play any role in redressing violations of the Constitution.

If exhaustion is to be required it must be for reasons other than implementing or respecting a congressionally established administrative scheme. Exhaustion in a case such as this could plausibly be urged to serve one of two purposes. First, if an aggrieved party were to obtain in the state administrative proceeding the relief that would otherwise be sought in federal court, the work of those courts would be reduced. Second, if the victim's injuries are redressed by the state itself, some potential for federal-state conflict might be avoided. We do not suggest that either of these justifications are persuasive, but

only that it must be on a basis such as this that exhaustion is grounded. See McKart v. United States, 395 U.S. 185, 193-95 (1969).

All the justifications that might be advanced in this or any other case for requiring administrative exhaustion rest on one absolutely essential assumption -- that the agency whose procedures must be pursued will make a serious and good faith effort to consider the plaintiff's claims and to implement the same rules that the plaintiff seeks to enforce in court. Absent that assumption, there is no reason whatever to believe that any of the purposes of exhaustion will be served. If the agency is not acting in good faith, no possible relief can come of the agency proceedings, and the federal courts in ultimately granting relief will have to disapprove of the agency proceeding as well as the initial

violation. More seriously, an agency proceeding in bad faith could manipulate an exhaustion requirement to severely aggravate the violation that has already occurred. Rather than "building a record," the proceeding could be used as an opportunity to conduct pre-trial discovery and then reshape the agency's defense. The resolution of the underlying claim could be delayed in the hope of exhausting the plaintiff's resources or his or her patience.

We do not contend that this crucial assumption of agency good faith and minimal competence is mistaken as to all state agencies, or unjustified on the facts of this particular case. Rather, we urge that this assumption is totally inconsistent with the findings and conclusions which led Congress to adopt the 1871 Civil Rights Act. The forty-second Congress, we contend, believed that state officials were certainly

unable, and in most cases unwilling, to comply with or enforce the United States Constitution. In light of that finding, which lies at the heart of the 1871 Act, we submit that Congress cannot conceivably have intended to require aggrieved parties, prior to obtaining access to federal courts, to seek redress from the very state officials whom Congress concluded would deny it.

One critical purpose of the 1871 Act was "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." Monroe v. Pape, 365 U.S 167, 174 (1961). Congressman Stoughton asserted

> The whole South, Mr. Speaker, is rapidly drifting into a state of anarchy and bloodshed, which renders the worst Government on the face of the earth respectable by way of comparison. There is no security for life, person or property. The State authorities and local courts are un-

> able or unwilling to check the evil or punish the criminals. 18/

Representative Perry exclaimed:

> Where these gangs of assassins show themselves, the rest of the people look on, if not with sympathy, at least with forebearance. The boasted courage of the South is not courage in their presence. Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal for justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished. 19/

Senator Pool argued that the state "courts have been tried, and the executive arm has

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18/ Cong. Globe, 42nd Cong., 1st Sess. 321.

19/ Id. App. 78.

been tried, and both have failed."[20/]

Representative Snyder noted that

> multiplied hundreds of loyal people, both male and female, have been whipped, scourged, lacerated, exiled, robbed, and murdered, by these demonish Klans. ... Anarchy and violence are supreme and the adherents of the Government are utterly unprotected. They appeal in vain to State authority, and are now before us as humble suppliants for federal protection. [21/]

Senator Morton argued

> But it is said these crimes should be punished by the States; that they are already offenses against the laws of the States, and the matter should be left with the States. The answer to that is, that the States do not punish them; the States do not protect the rights of the people; the State courts are powerless to redress these wrongs. The great fact remains that large classes of people, numbering nearly one half in some States, are without legal remedy in the courts of the States. Should this fact be overlooked for the sake of a theory? Shall it be said with any reason that

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20/ Id. App. 170.

21/ Id. App. 199.

> it is proper to leave the punishment of these crimes to the States when it is a notorious fact that the States do not punish them. 22/

Senator Osborn explained:

> If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all. But they have not done so. We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves, i.e., the full and complete administration of justice in the courts. 23/

Congresman Rainey remarked:

> The question is sometimes asked, Why do not the courts of law afford redress? Why the necessity of appealing to Congress? We answer that the courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity. What benefit could result from an appeal to tribunals

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22/ Id. App. 252.

23/ Id. at 653.

> whose officers are secretly in sympathy with the very evil against which we are striving. 24/

Senator Pratt urged:

> [O]f the hundreds of outrages committed upon loyal people through the agency of this Klu Klux Klan organization, [but] not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples. 25/

Congressman Lowe argued

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of

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24/ Id. at 394.

25/ Id. at 505.

> the public tribunals are searched in vain for any evidence of effective redress.26/

Mr. Beatty asserted:

> [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent.27/

Recognizing that the forty-second Congress believed that remedies nominally available on the face of state laws were not available in practice, Justice Rehnquist urged in City of Columbus v. Leonard 443 U.S. 905 (1979) (Rehnquist, J., dissenting from denial of certiorari) that exhaustion might nonetheless be required where a state could demonstrate in fact "that there is an available and adequate remedy." The

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26/ Id. at 374.

27/ Id. at 428.

practice suggested by Justice Rehnquist is far different from any requirement hitherto imposed by the federal courts, and would defeat rather than advance the purposes behind exhaustion.

To put itself outside the category of cases about which Congress was concerned, a state would have to prove more than that some administrative procedure existed in which the relief sought in federal court was technically available. A state would have to demonstrate by clear and convincing evidence that such relief was <u>in fact</u> provided by that process to persons such as the plaintiff. The resolution of such claims would necessarily defeat the very purposes of exhaustion. Far from reducing the workload of the federal courts, this novel approach would force federal judges to preside over often

lengthy trials regarding the entire case-load and history of the agency, weighing the frequency and type of relief awarded, ascertaining whether relief was equally available in all relevant types of cases, and searching for meritorious claims that might have been wrongfully denied. Often such hearings would be more time consuming and complex than the actual trial on the merits. In addition, rather than deferring to state authorities on the assumption that they would act competently and in good faith, the federal courts would be required to sit in judgment on the actual abilities and character of the state officials involved, a process virtually certain to aggravate federal-state relations. This entire process, moreover, would be an attempt by the state to prove that, however justified the Congress might have been in

enacting the 1871 Civil Rights Act, its underlying findings were erroneous as applied to the administrative agency. The federal courts do not ordinarily sit to reconsider the wisdom or accuracy of congressional findings.

We recognize that circumstances in the South have changed greatly since the enactment of the 1871 Civil Rights Act. Some administrative remedies now in existence are fair or efficient or both; others, regrettably, are neither. But Congress gave the federal courts no mandate to conduct trials on the efficacy and biases of each of the thousands of state agencies that abound today, and no authority to pick and chose when section 1983 would afford its protections.

Rather, Congress provided for the possibility of improvement in the conditions which it found in 1871 by permitting

aggrieved parties to utilize any state remedies, administrative, judicial or legislative, which they believed to be efficacious. Such individual decisions, by people who will often understand the realities of the agencies far better than a federal judge, impose none of the burdens on federal courts or difficulites for federal-state relations inherent in Justice Rehnquist's proposal. This statutory system provides state agencies anxious for an opportunity to resolve disputes internally with a powerful incentive to make genuine administrative relief available in practice in order to persuade aggrieved parties to seek redress there rather than in federal court. Regardless of whether this Court might today choose a different approach, this is the scheme enacted by Congress when it adopted the 1871 Civil

Rights Act, and it is the scheme which the federal courts must adhere to until and unless Congress directs otherwise.

IV. THE DEBATES CONCERNING THE SHERMAN AMENDMENT

In this case, as in Monroe, Monell and Owen, considerable light is thrown on the intent of Congress by the controversy surrounding the Sherman Amendment. The first conference report on the 1871 Civil Rights Act contained a provision drafted by Senator Sherman which imposed on a city or county strict liability for any injuries caused by a riot within its borders. This proposal was rejected by the House on a variety of grounds. Monell v. New York City Department of Social Services, 436 U.S at 669-683. Congress then adopted language, now codified as 42 U.S.C. § 1986, imposing liability on any person who had

knowledge of a conspiracy to violate the victim's civil rights and failed to use his or her power to prevent it.[28/]

28/ In rejecting the application of the doctrine of respondeat superior to impose on cities or counties strict liability for constitutional violations committed by their officials, Monell relied heavily on the history of the Sherman Amendment. 436 U.S. at 693-94. Monell reasoned that the debates on that amendment provided a critical insight into Congress' views as to the circumstances under which liability should be imposed on a defendant.

One aspect of the Sherman amendment debates relied on by Monell was opposition to the amendment on the ground that it imposed liability on a local government even if it "did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it." 436 U.S at 692, n.57. Senator Stevenson argued the amendment "undertakes to create a corporate liability for personal injury which no prudence or foresight could have presented." Cong. Globe, 42nd Cong., 1st Sess. 762. Representative Kerr objected,

> There is ... a total and absolute absence of notice, constructive or implied, within any decent limits of law or reason. ... Under this

The language adopted in place of the Sherman amendment, and now contained in section 1986, represents the view of Congress as to the amount of knowledge and degree of action or inaction appropriate for the imposition of the liability by the fedral courts. The substitute amendment provided:

> [A]ny person or persons having knowledge of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed; such person or persons shall be liable to the person injured, or his legal representatives. Id. at 804.

28/ continued

> section it is not required, before liability attach, that it shall be known that there was any intention to commit these crimes, so as to fasten liability justly upon the municipality. Id. at 788.

See also id. at 791 (Rep. Willard.)

The form of knowledge called for was knowledge prior to the alleged violation that the act subsequently complained of was to occur; the action required was failure to prevent that harm. This combination of foreknowledge and lack of prevention represents a carefully framed balance of the competing considerations urged in the congressional debates. These prerequisites to liability were not only the minimum conservatives would accept as a precondition to suit, but the most the supporters of Reconstruction would concede.

The imposition of an exhaustion requirement would alter this balance in substantial manner clearly not contemplated by Congress. First, in addition to knowing that a violation was about to occur, a city would have to be notified <u>after</u> the violation that the victim wanted redress. Second, over and above having failed to

prevent the violation, the city would have to fail as well to provide a subsequent remedy. During the debates on the Sherman amendment Senator Thurman actually advocated just such an exhaustion requirmeent, urging that plaintiffs be required to give cities a written notice of claim within 7 days of the commission of the offense, citing a statute with such a provision enacted under George IV. Id. at 770. This proposal found no support in Congress, however, and was not included in the language ultimately adopted.

If Congress did not contemplate any exhaustion requirement under section 1986, a fortiori, it cannot have intended one under section 1983. Unlike a section 1986 defendant, who is liable merely for failing to prevent harm to the victim, a section 1983 defendant must actually commit

or cause the violation itself. Monell, 436 U.S. at 692. Thus a section 1983 defendant by definition knows more and does more than a section 1986 defendant. And, since the 1983 defendant is the active evildoer, not merely a neglectful bystander, it is far less likely that an appeal for redress would succeed to the former than to the latter. If a city failed to prevent a known conspiracy of police officers from violating a victim's constitutional rights, exhaustion would not be a precondition of a section 1986 suit against the city; Congress cannot have intended to impose such a requirement on a section 1983 suit against the policemen themselves.

CONCLUSION

For the above reasons the judgment of the court of appeals should be reversed.

Respectfully submitted,

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